Supreme Court, U.S.
FILED
JAN 17 1996
CLERK

No. 95-726

In The
Supreme Court Of The United States
October Term, 1995

STATE OF CONNECTICUT,
Petitioner,
v.
MURRAY COLTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JOHN M. BAILEY
Chief State's Attorney

JACK W. FISCHER*
Assistant State's Attorney
Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067
(860) 258-5807

*Counsel of Record

Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

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STATUTORY PROVISIONS INVOLVED

United State Code §1257 (a) provides:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any state is drawn into question on the ground of it being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

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I. THIS COURT HAS JURISDICTION TO REVIEW THE DECISION BELOW

After being afforded appellate review of *his* double jeopardy claim, the respondent now asserts that the ruling by the Connecticut Supreme Court is an interlocutory order, not a "final judgment" under 28 U.S.C. § 1257. The respondent argues that the ruling is not a final judgment because it is "nothing more" than a remand for an evidentiary hearing.[1]

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[1] The petitioner takes this opportunity to correct an error in its petition. In footnote 2, on page nine, the first sentence should read "The *petitioner* argued on appeal," not the *respondent*. The petitioner apologizes for the error and any inconvenience it may cause.

The respondent's assertion is meritless. This Court has jurisdiction over this case because the double jeopardy issue "will not survive for this Court to review, regardless of the outcome of the proceedings on remand." *Pennsylvania v. Ritchie*, 480 U.S. 39, 48, 107 S.Ct. 989, 996, 94 L.Ed.2d (1987). Thus, the unreviewed decision of the Connecticut Supreme Court will remain in effect and leave unquestioned its expansive and erroneous interpretation of the Double Jeopardy Clause. *See Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 485-86, 95 S.Ct. 1029, 1041, 43 L.Ed.2d 328 (1975).

"Normally the finality doctrine contained in §1257[] is not satisfied if the state courts still must conduct further substantive proceedings before the rights of the parties as to the federal issues are resolved." *Pennsylvania v. Ritchie*, 480 U.S. at 47. 107 S.Ct. at 996. However, one of the exceptions to this general rule states that the Court may consider cases:

> "'[W]here the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. . . . [I]n these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review.'"

Pennsylvania v. Ritchie, 480 U.S. at 47-48, 107 S.Ct. at 996, quoting *Cox Broadcasting Corporation v. Cohn*, 420 U.S. at 481, 95 S.Ct. at 1039.

Here, the case before this Court satisfies this standard because the Fifth Amendment Double Jeopardy issue "will not survive for this Court to review, regardless of the outcome of the proceedings on remand." *Pennsylvania v. Ritchie*, 480 U.S. at 48, 107 S.Ct. at 996. Procedurally, this case is virtually identical to *Pennsylvania v. Ritchie*.

First, if the trial court decides, on the merits, that no prosecutorial misconduct occurred, then Connecticut will have prevailed and will have no basis to seek review. *Id.* In this situation, the question of whether a hearing on the issue of prosecutorial misconduct should have been held will be moot. *Id.* Should the respondent appeal the trial court's decision, Connecticut's only method for preserving the constitutional issue would be by cross-claims. *Id.* "Thus, the only way that *this* Court will be able to reach the [double jeopardy] issue is if [the respondent] eventually files a petition for certiorari on the trial court's adverse ruling, and [Connecticut] files a cross-petition. When a case is in this procedural posture, [this Court has] considered it sufficiently final to justify review." *Id.* (Emphasis in original).

Secondly, if Connecticut succeeds upon remand and the respondent does not directly appeal and subsequently is convicted at trial, Connecticut's ability to gain review of this issue would again depend upon the respondent's willingness to raise the issue on appeal, and, again, Connecticut would have to cross-appeal. If the respondent were acquitted, Connecticut

would be "barred from seeking review by the Double Jeopardy Clause." *Pennsylvania v. Ritchie*, 480 U.S. at 48, 107 S.Ct. at 996.

Finally, if the trial court decides, on the merits, that there was prosecutorial misconduct and that double jeopardy bars a retrial, although Connecticut could appeal the issue on the merits, the question of whether a hearing should have been held could not be successfully appealed because of the law-of-the-case doctrine. *See Pennsylvania v. Ritchie*, 480 U.S. at 48 n.7, 107 S.Ct. at 997 n.7. ("if the [state] were to raise the issue again in a new set of appeals, the courts below would simply reject the claim under the law-of-the-case doctrine.) While Connecticut might ultimately be able to raise this claim in this Court, "[t]he goals of finality would be frustrated, rather than furthered, by [such] wasteful and time consuming procedures." *Id.*

In sum, if this Court does not consider this double jeopardy issue now, there may be no opportunity to do so in the future. *Id.* In such circumstances, this Court has jurisdiction to review the decision below. [2]

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[2] Indeed, the very case at the heart of this petition came to this Court in a similar posture. In *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), after gaining a mistrial, the respondent Kennedy's motion to dismiss on double jeopardy grounds was denied by the trial court. *Kennedy*, 456 U.S. at 669-70, 102 S.Ct. at 2086. He successfully appealed to the Oregon Court of Appeals. 456 U.S. at 670, 102 S.Ct. at 2086. This Court granted Oregon's petition for certiorari, reversed the judgment of the Oregon

(continued...)

The respondent further contends that the double jeopardy claim has not been "finally decided" because it must await the factual findings of the remand hearing. This contention is also without merit.

The question at issue is whether the Double Jeopardy Clause authorizes such a proceeding at all. The decision below has decided *that* issue fully and completely. The results of an evidentiary hearing are thus completely irrelevant to the question of whether that hearing should even be held. Most emphatically, it is the very initiation of such hearings - and the waste of time and resources that will accompany them - that the petitioner fears, not the findings.

The question presented to this Court is a question of federal constitutional law:

> Whether a claim under *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) can be raised when the defendant never moved for mistrial during the prior prosecution and the prior conviction was reversed on appeal on grounds other evidentiary insufficiency or prosecutorial misconduct?

This question has been fully decided by the highest court in Connecticut. This Court thus has jurisdiction to review the

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[2](...continued)
Court of Appeals and remanded the case for further proceedings. 456 U.S. at 679, 102 S.Ct. at 2091.

question presented. For the reasons set forth in the petition for writ of certiorari, the question presented should be reviewed.

II. THE DECISION BELOW WAS EXPRESSLY CONFINED TO FEDERAL CONSTITUTIONAL LAW

The respondent next contends that the decision below rests on "independent and adequate state grounds." This contention is as inexplicable as it is meritless.

The decision below was expressly confined to federal constitutional law, with the court stating:

> Because the defendant has not presented a separate analysis of his double jeopardy claim under the state constitution, we confine our analysis to the application of the federal constitution's double jeopardy bar.

State v. Colton, 234 Conn. 683, 686 n.6, 663 A.2d 339, 341 n.6 (1995).

Indeed, this case could not involve a state issue because the Connecticut constitution does not have a double jeopardy provision; *id.*; and, as noted, the respondent did not raise a claim under state law. *Id.*

Equally meritless is the respondent's contention that the decision below was a state procedural ruling based upon a

"long line of state precedent." The respondent's elaborate argument does not require an elaborate response.[3]

The decision below expressly stated that the issue was "one of first impression in Connecticut." *State v. Colton*, 234 Conn. at 696, 663 A.2d at 346. Thus there is no "long line of state precedent." Moreover, the decision was confined to federal constitutional grounds and is bereft of procedural analysis. Clearly it does not involve an issue of established state procedure.

III. THE SPLIT IN THE CIRCUITS IS WELL RECOGNIZED AND REQUIRES RESOLUTION BY THIS COURT

The respondent next contends that there is no split among the Circuit Courts on the question presented. Contrary to the respondent's assertion, however, the Eighth Circuit and the Connecticut Supreme Court openly acknowledge that a split on the issue does exist between the Second and Seventh Circuits. *Jacob v. Clark*, 52 F.3d 178, 179 (8th Cir. 1995); *State v. Colton*, 234 Conn. at 696, 663 A.2d at 346.

The respondent's argument that there is no need to resolve this split should also be rejected. A clear call for guidance emanates from the number of Circuits that have "struggled with the question" and have left the question undecided. *See Jacob*, 52 F.3d at 181; *Fugitt v. Lemacks*, 833 F.2d 251, 252 n. 1 (11th Cir. 1987).

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[3] *See United States v. Wurzbach*, 280 U.S. 396, 399, 50 S.Ct. 167, 169, 74 L.Ed. 508 (1930).

Nor does the respondent's reference to this Court's denial of certiorari in other cases buttress his argument. A denial of certiorari carries no implication or inference. *United States v. Kras*, 409 U.S. 434, 443, 93 S.Ct. 631, 637, 34 L.Ed.2d 626 (1973). If one were to speculate as to why certiorari were denied, the most likely explanation is that review by this Court would not have resulted in any relief. This is because most courts have avoided the issue by ruling instead that the merits of the case would not meet the "demanding standard of *Kennedy*." *Beringer v. Sheahan*, 934 F.2d 110, 111 n.1 (7th Cir.) *cert. denied*, 502 U.S. 1006, 112 S.Ct. 641, 116 L.Ed.2d (1991).

Unlike those cases, this Court can grant relief here. The respondent has prevailed below on a question of constitutional law, gaining a substantive remedy under the Double Jeopardy Clause. Thus this case is not about a hypothetical application of the Double Jeopardy Clause. Accordingly, it is worthy of review by this Court.

Moreover, this will not be a "rare case," despite the respondent's claims to the contrary and the wishful thinking of the Connecticut Supreme Court. The decision below gives a criminal defendant every incentive to raise such double jeopardy claims in the future. If *Kennedy* claims can be brought without any foundation, common sense dictates that such claims will be raised with increasing frequency. Certiorari should be granted to review the ill-considered opinion below before it is followed by other courts and unnecessarily consumes finite legal resources.

IV. THE DECISION BELOW IS AN APPROPRIATE VEHICLE FOR ADDRESSING THE QUESTION PRESENTED

The respondent's protestations aside, the petitioner respectfully submits that the decision below is a model vehicle for reviewing the question presented: It is confined to federal constitutional law; it implicates a split among the Circuits; it follows the more expansive view of the Second Circuit; it awarded the respondent substantive relief on that basis; and it is a full and final judgment from Connecticut's highest court. Thus it provides this Court with the opportunity to correct the erroneous decision below and to resolve the conflict among the Circuit Courts.

CONCLUSION

For all the foregoing reasons, as well as those set out in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

THE STATE OF CONNECTICUT

John M. Bailey
Chief State's Attorney

Counsel of Record:

Jack W. Fischer
Assistant State's Attorney
Appellate Bureau
Office of the Chief
State's Attorney

January, 1996